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OCT 25 1983
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No. 82-1990

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT RUSSELL AUSTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

Department of Justice
Washington, D. C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner is entitled to a new trial because of the prosecutor's alleged failure to disclose a promise of leniency made to a prosecution witness.

2. Whether petitioner was deprived of the effective assistance of counsel.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not reported, but the affirmance is noted at 709 F.2d 1509 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1983. By letter dated May 3, 1983, Justice O'Connor extended the time in which to file a petition for a writ of certiorari to and including May 31, 1983, and the petition was filed on May 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of RICO conspiracy, in violation of 18 U.S.C. 1962(d), and on 15 counts of mail fraud, in violation

of 18 U.S.C. 1341.[1] He was sentenced to concurrent 30-month terms on each count (C.A. App. 29).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 1a-4a). It showed that Will Ulmer, Lonnie Ervin, and Gwendolyn Clemens set up an unnamed land investment company or partnership in Detroit, Michigan, the sole business of which was the pursuit of an illegal arson-for-profit scheme. The insurance proceeds collected from the arsons were used to purchase other houses that also were burned. To conceal who owned the partnership, the real estate was placed in the names of relatives and friends of the members of the group. Petitioner, a licensed public insurance adjuster, adjusted 13 of the fires set by the conspirators. Clemens testified at trial that petitioner knew about and was an active participant in the fraudulent scheme. She testified that petitioner was aware that false contents lists were being submitted, that he was made aware of impending fires, and that documents listing the houses' contents and various people as the owners were submitted without those persons' ever talking with petitioner. Finally, Clemens testified that petitioner charged the enterprise an 8%, rather than the usual 10%, commission.

In its examination of Clemens, the government established that she was testifying pursuant to an agreement that her testimony would not be used against her (Tr. 39). During cross-examination, Clemens was asked about the status of a state criminal prosecution in which she had pleaded guilty in early 1979 to possession of heroin with intent to distribute it. Clemens responded that she had not yet been sentenced in that case and that she had not had to appear for sentencing in it. She explained that Agent Joe Finnigan of

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[1]Petitioner was acquitted on three other mail fraud counts (C.A. App. 29).

the FBI had "handled" or "taken care" of it. Clemens stated, however, that Agent Finnigan did not tell her what he had done to take care of the matter and that he did not tell her that he had made arrangements with personnel in the state court (Tr. 107-108).

2. On appeal, petitioner contended that his conviction should be set aside because of an undisclosed promise to Clemens regarding her testimony. The court of appeals rejected this contention, concluding that petitioner had failed to satisfy the test established by *Giglio* v. *United States*, 405 U.S. 150 (1972), for granting relief. In particular, the Court found that petitioner's allegations of an undisclosed promise "do not approach the specificity of the allegations made in *Giglio*" and were "conclusory and without any factual support in the record" (Pet. App. 3a). Moreover, the court of appeals concluded that there was sufficient disclosure of Clemens' self-interest from which the jury could adequately evaluate her credibility (*ibid.*).

The court of appeals also rejected petitioner's claim that he had received ineffective assistance of counsel. The court noted that petitioner had not made this argument in district court, thereby depriving the court of appeals of findings on the issue, but that assuming the claim was properly before the court, it was "without merit" (Pet. App. 3a).

ARGUMENT

1. Petitioner contends (Pet. 5-9) that his conviction should be set aside under *Giglio* v. *United States*, 405 U.S. 150 (1972), because of an undisclosed promise of leniency to Clemens in connection with her state narcotics conviction. This contention is without merit.

a. Clemens herself testified before the jury on cross-examination that the state sentencing had been postponed at the instance of FBI Agent Finnigan (Tr. 107-108), the

federal agent to whom she had disclosed the arson scheme (Tr. 105-106). As petitioner points out (Pet. 5; Pet. App. 5a-8a) the state sentencing of Clemens has been continued on a number of occasions. We have been informed by Agent Finnigan that those postponements have been at the FBI's request because of Clemens' cooperation in a number of investigations, not simply this case, but that Clemens was promised nothing by the FBI other than that her cooperation would be brought to the attention of the state sentencing court. That much, of course, would seem obvious from Clemens' own testimony at trial that it was FBI Agent Finnigan who had "taken care" of the matter of her appearance for sentencing in state court. Petitioner has not identified any evidence of any arrangement between Clemens and the federal government that goes beyond these facts. Thus, concerning FBI Agent Finnigan's role with respect to Clemens' sentencing in state court, this is not an instance of an arrangement between the government and a witness that was "undisclosed" to the jury and therefore unavailable to it in judging the witness's credibility. This Court's decision in *Giglio* v. *United States*, *supra*, concerning a prosecution witness's false denial of an undisclosed agreement, therefore has no application here.[2]

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[2]Petitioner's assertion (Pet. 5-6) that there is a conflict between the decision below and the First Circuit's decision in *United States* v. *Ramos Algarin*, 584 F.2d 562 (1978), similarly is without merit. In *Ramos Algarin*, the prosecution read to the jury an agreement between a witness and the government under which the witness would plead guilty to one of four counts in return for his cooperation and the government would dismiss the remaining counts and make no recommendation as to sentence. However, the day after the jury returned its verdict, the government moved to dismiss all charges against the witness, and the motion was granted. 584 F.2d at 563-564. The government contended that the decision to dismiss was unilateral, based on the witness's minimal culpability. The court of appeals found the government's about-face troubling and indicated that it would have been inclined to remand for further proceedings but for the fact that the

b. Moreover, the Court in *Giglio* made clear that even where there was in fact a false denial of an undisclosed promise of leniency, a new trial is not automatically required. The defendant must show a "reasonable likelihood" that the information could "have affected the judgment of the jury" in order for a new trial to be ordered. 405 U.S. at 154 (quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959)). The court of appeals expressly applied that standard in this case (Pet. App. 3a) — a standard that is fully consistent with the Ninth Circuit's formulation in *United States* v. *Butler*, 567 F.2d 885 (1978), upon which petitioner relies (Pet. 7).

In this case, as the court of appeals held, "there was sufficient disclosure of Clemens' self-interest from which the jury could adequately judge her credibility" (Pet. App. 3a). Clemens herself testified that Agent Finnigan had arranged for the postponement of sentencing on the state charges, thereby sufficiently disclosing the basis for an argument by petitioner that she had an interest in testifying for the government in order to obtain a favorable sentence on those charges.[3] Given this, there is no reasonable likelihood that

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defendant had failed to satisfy the second requirement of *Giglio* by showing a reasonable likelihood of an effect on the jury's verdict. 584 F.2d at 565. Thus, in *Ramos Algarin*, the government's actions appeared flatly to contradict the agreement described to the jury. Here, in contrast, the state court's postponement of Clemens' sentencing is fully consistent with Clemens' testimony that Agent Finnigan had "taken care" of her appearance for sentencing, and therefore does not suggest some other undisclosed agreement with Clemens. Moreover, here, as in *Ramos Algarin*, there is not a reasonable likelihood that the jury's deliberation would have been affected by further development of the evidence pertaining to Clemens' relationship to Finnigan. See point 1(b) in text.

[3]We have been informed by the Assistant United States Attorney responsible for the case that although the closing arguments to the jury were not transcribed, it is his recollection that defense counsel in fact relied upon the postponement of sentencing in the state prosecution as evidence impeaching her credibility.

more detailed evidence of Clemens' relationship with Finnigan would have affected the jury's deliberations. Clemens also might have had a motive to testify favorably for the government in order to avoid prosecution in connection with the arson offenses for which petitioner was being tried.[4] And even aside from Clemens' testimony, there was other evidence to support the verdict. See, *e.g.*, Tr. 336-339, 391, 456-459, 466, 542-550, 582-586, 590-592, 598-609, 634-644, 962. The court of appeals' fact-bound application of the standard of materiality announced in *Giglio* to the circumstances of this cases does not warrant further review.

2. Petitioner also contends (Pet. 9-11) that he received ineffective assistance of counsel at trial. As the court of appeals observed (Pet. App. 3a), this contention was not presented to the district court. The court of appeals therefore was deprived of any findings by the trial court with respect to the nature of counsel's performance, his reasons

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[4]Petitioner also states (Pet. 6) that the government "disclosed that Clemens was given immunity in the arson conspiracy case (Tr. at 39)," thereby apparently contending that Clemens was granted immunity from prosecution for her role in the arson scheme. See also Pet. App. 2a-3a, quoting the government's brief in the court of appeals (at 12). From this premise, petitioner argues (Pet. 8) that the possibility that Clemens would perjure herself to favor the government was actually reduced because she already had received a commitment that she would not be prosecuted that the government was bound to honor. Contrary to petitioner's submission, to the extent the jury may have believed that Clemens received immunity from prosecution in return for her testimony, her credibility would actually have been significantly impeached in the jury's mind. In fact, however, it appears that Clemens was granted only immunity from the use of her testimony, not immunity from prosecution. Clemens actually testified in response to the prosecutor's questioning only that she had been granted immunity from the use of her testimony against her (Tr. 39), a statement consistent with her subsequent testimony that she believed she still could be prosecuted (Tr. 103-104). Thus, if the jury believed that Clemens could not be prosecuted, petitioner benefited from a more favorable picture of Clemens' self-interest than the circumstances warranted.

for any actions petitioner now asserts were deficient, whether counsel's performance was within the range of competence required of attorneys in criminal cases, and whether there was any resulting prejudice to petitioner. The courts of appeals generally are in agreement with the view of the court below (Pet. App. 3a) that because there often will be such deficiencies in the record, claims of ineffective assistance of counsel should not ordinarily be considered for the first time on direct appeal, but should instead be presented first to the district court in a motion for a new trial or on collateral attack under 28 U.S.C. 2255.[5]

The soundness of this approach is established by what petitioner labels as counsel's "most egregious error" — his failure to call Agent Finnigan to testify about the asserted promise of leniency to Clemens in regard to the state narcotics conviction. See Pet. 9-10. It is entirely possible, for example, that counsel did not call Finnigan because he believed that Finnigan would testify that he could not and did not promise Clemens leniency in connection with the state proceedings, thereby undermining the suggestion that Clemens' testimony was tainted by self-interest in order to obtain a favorable sentence in state court.

Petitioner's other instances of alleged ineffectiveness are equally insubstantial on the present record. Petitioner contends (Pet. 11), for example, that counsel was ineffective because he waived petitioner's right to appellate review of the sufficiency of the evidence by not renewing his motion for a directed verdict at the close of the government's case. But this claim obviously is groundless, because the court of

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[5]See cases cited in U.S. Br. at 40-41 n.30, *United States* v. *Cronic*, cert granted, No. 82-660 (Feb. 22, 1983) (a copy of the page proofs of this brief is being lodged with the Court).

appeals in fact considered on the merits (and rejected) petitioner's challenge to the sufficiency of the evidence (Pet. App. 3a-4a). Petitioner also contends (Pet. 11) that counsel was unprepared to cross-examine Clemens. He cites, however, only one feature of the cross-examination: that it was counsel for his co-defendant, not his own attorney, who brought out that Clemens in fact had pleaded guilty in state court to possession of heroin, not cocaine, as she had testified (Tr. 106, 326). But petitioner does not explain why the particular drug involved was of any moment, and he overlooks that he was not prejudiced in any event because the discrepancy was brought out by co-counsel.

Finally, petitioner objects (Pet. 10) to his attorney's questioning of Clemens on cross-examination about other fires, including 1,000 that she knew of and 120 in which her company was involved (Tr. 217-218). Petitioner contends that this course constituted error because it enabled the prosecutor to elicit on redirect examination that petitioner was involved in fires in addition to the four charged in the indictment (Tr. 274). Petitioner fails to point out that his attorney's questioning of Clemens about numerous other fires was part of an effort to establish that petitioner was involved as an adjuster in a relatively small percentage of the total number of fires Clemens had identified, thereby suggesting an absence of guilty knowledge (Tr. 217-221). Moreover, the evidence of the additional fires first was introduced by the attorney for petitioner's co-defendant (Tr. 137-138), so that petitioner's attorney simply acted in light of material already before the jury. Finally, as the district court noted in admitting the evidence (Tr. 277-278), the testimony would have been admissible under Fed. R. Evid. 404 in any event, as proof of a scheme and plan. At the very least, it cannot be found on the present record that counsel's questioning in these circumstances so far departed

from the normal range of competence of defense counsel and so prejudiced defendant that it constituted a Sixth Amendment violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

OCTOBER 1983

DOJ-1983-10